FEDERAL COURT OF AUSTRALIA

Singh v Minister for Immigration and Border Protection [2013] FCA 1325

Citation:	Singh v Minister for Immigration and Border Protection [2013] FCA 1325
Appeal from:	*Singh v Minister for Immigration & Anor* [2013] FCCA 1421
Parties:	**MANJINDER SINGH v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and MIGRATION REVIEW TRIBUNAL**
File number:	SAD 290 of 2013
Judge:	**MANSFIELD J**
Date of judgment:	6 December 2013
Date of hearing:	28 November 2013
Date of orders:	28 November 2013
Place:	Adelaide
Division:	GENERAL DIVISION
Category:	No catchwords
Number of paragraphs:	25
Counsel for the Appellant:	The appellant did not appear
Counsel for the Respondent:	B Rayment
Solicitor for the Respondent:	Sparke Helmore

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION **SAD 290 of 2013**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN:	**MANJINDER SINGH** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **Respondent**
	MIGRATION REVIEW TRIBUNAL **Second Respondent**
JUDGE:	**MANSFIELD J**
DATE OF ORDER:	**28 NOVEMBER 2013**
WHERE MADE:	**ADELAIDE**

THE COURT ORDERS THAT:

1. The application is refused.
2. The appellant pay to the respondent costs of the application.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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SOUTH AUSTRALIA DISTRICT REGISTRY
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ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN:	**MANJINDER SINGH** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **Respondent**
	MIGRATION REVIEW TRIBUNAL **Second Respondent**
JUDGE:	**MANSFIELD J**
DATE:	**6 DECEMBER 2013**
PLACE:	**ADELAIDE**

REASONS FOR JUDGMENT

1 1 This is an appeal from orders made by the Federal Circuit Court on 24 September 2013: *Singh v Minister for Immigration & Anor* [2013] FCCA 1421.

2 2 Judge Brown dismissed with costs an application seeking judicial review of a decision of the Migration Review Tribunal (the Tribunal) made on 6 May 2013. The Tribunal affirmed a decision of a delegate of the first respondent of 18 December 2012 to refuse to grant to the appellant a Skilled (Provisional) (Class VC) visa.

3 3 The appellant did not appear at the hearing. He was notified of the hearing by letter from the National Appeals Registrar of the Court of 24 October 2013. He was also notified of the hearing by letter from the first respondent's solicitors of 12 November 2013, when the first respondent sent to him a copy of the first respondent's submissions. No explanation was proffered, nor any communication made, to explain his non-attendance. On the application of counsel for the first respondent, I made an order that the appeal be dismissed with costs, pursuant to r 36.75(1)(a)(i) of the *Federal Court Rules 2011* (Cth) (the Rules). In case there was some proper explanation for the appellant not attending the hearing, I directed that the

order dismissing the appeal with costs not be sealed until 4:00 pm on 28 November 2013 when the appeal was heard.

4 4 In any event, I proceeded to hear the appeal. I had the benefit of the outline of submissions from the first respondent. I had also had the opportunity of considering the reasons for decision of the Tribunal, and the reasons for judgment of the Federal Circuit Court. It appeared to me that there was little if anything that the appellant could say which would enable his appeal to be successful. He had filed no documents which might have demonstrated error on the part of the Federal Circuit Court, or indeed on the part of the Tribunal.

5 5 It is not necessary further to explain why the order was made under r 36.75 of the Rules.

6 6 These reasons are published to explain why, on the merits, the appeal was dismissed in any event.

BACKGROUND

7 7 The appellant is a citizen of India. On 6 May 2011, he applied for a Skilled (Provisional) (Class VC, Sublcass 485) visa under the *Migration Act 1958* (Cth) (the Act). As required, he provided with his visa application the results of an IELTS test undertaken in India on 27 November 2010, in which were recorded scores of 6.5 and 7 in the four test components.

8 8 That is the International English Language Testing System. The results included a photograph of the person who took the test attached to the result.

9 9 Relevantly for present purposes, the appellant was required to satisfy Public Interest Criteria 4020, contained in cl 485.224(a) of Sch 2 to the *Migration Regulations 1994* (the Regulations) to be eligible for the visa.

10 10 In essence, PIC 4020 requires that there is no evidence before the decision-maker that the visa applicant has given, or caused to be given a bogus document or information that is false or misleading in a material particular in relation to the application for the visa.

The decision of the delegate

11 11 On 10 July 2012, the delegate of the first respondent wrote to the applicant inviting him to comment on information that the delegate had obtained as a result of attempting to

verify his IELTS test report form. The delegate had identified that the appellant's passport photograph appeared to differ from the photograph on the IELTS test report form provided by the appellant, so that the IELTS test report form provided by the appellant may have been a bogus document. The appellant was given 28 days to respond. No response was made, other than the authorised recipient for the appellant on 7 August 2012 notified the department that it no longer acted for the appellant.

12 12 Consequently, on 18 December 2012, the delegate refused to grant the visa to the applicant on the basis that he did not satisfy PIC 4020 and cl 485.224(a) of the Regulations. The delegate found that the appellant had provided to the department a bogus document namely the IELTS results on the basis that an imposter had undertaken the test on the appellant's behalf and that the test report had been altered to include the appellant's photograph.

THE TRIBUNAL DECISION

13 13 The appellant applied for review of that decision to the Tribunal.

14 14 On 14 March 2013, the Tribunal wrote to the appellant pursuant to s 359A of the Act inviting the appellant to comment on the same information that the delegate had put to him, namely that the photograph of the candidate on the IELTS test report form submitted by the appellant was not the same person who undertook the test in India on 27 November 2010. That letter satisfied the requirements of s 359A(1)(b) and invited the appellant to comment in writing within the prescribed period.

15 15 In addition, on 4 April 2013, the Tribunal invited the appellant to attend a hearing on 30 April 2013.

16 16 The appellant did not respond to the invitation under s 359A. Consequently, by reason of ss 359C and 360(2)(c), and s 360(3), the appellant no longer became entitled to appear before the Tribunal: see s 363A. The Tribunal therefore cancelled the scheduled hearing.

17 17 The Tribunal considered the photographs of the candidate who took the IELTS test in India (available from the IELTS verification system) and the photograph on the IELTS test report submitted by the appellant. It was satisfied that the photographs were of 2 different people. It concluded that this was explained by the use of an imposter at the IELTS test in India and the fraudulent substitution of a photograph on the IELTS test report form.

18 18 Consequently, it was satisfied that the IELTS test report form submitted by the appellant was a bogus document as defined by s 97 of the Act, because it was a document altered by a person who did not have the authority to alter it. That bogus document was provided by the appellant in support of his visa application. It followed that the appellant did not satisfy the requirements of PIC 4020(1).

19 19 The Tribunal was entitled to consider whether or not to waive the requirements of PIC 4020(1), but it was not satisfied on the material before it that there were proper reasons to justify the grant of the visa notwithstanding the failure to satisfy the requirements of PIC 4020(1). It did not waive those requirements. It consequently affirmed the delegate's decision to refuse the applicant the visa he sought.

PROCEEDINGS IN THE FEDERAL CIRCUIT COURT

20 20 The appellant then lodged an application for judicial review in the Federal Circuit Court. The sole ground of review was that the decisions made by the Department and by the Tribunal were "wrong" and he asserted that he was in fact the person who sat the IELTS test.

21 21 That challenge was rejected. The Federal Circuit Court judge properly concluded that it was not his function to examine the merits of the decision (cf *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, but to determine whether there was jurisdictional error on the part of the Tribunal. His Honour concluded that there was ample evidence from which the Tribunal could have reached the view that a bogus document had been supplied in connection with the application, and that the bogus document emanated from the appellant. He also concluded that no procedural error had been exposed by the Tribunal's procedure in accordance with s 359(2) of the Act, so that the appellant's failure to respond to that letter within the prescribed time enabled the Tribunal to cancel the hearing scheduled for 30 April 2013. In particular, having regard to *Hasran v Minister for Immigration & Citizenship* (2010) 183 FCR 413, the Tribunal's decision to cancel the hearing and to proceed to hear and determine the application on the material before it was not affected by jurisdictional error.

THE APPEAL

22 22 By notice of appeal of 3 October 2013, the appellant has identified six grounds of appeal. They are general, and assertive, but do not really complain other than of the merits of the decision of the Tribunal. They are in the following terms:

1. The decision made by the immigration and tribunal is wrong.

2. Decision is not favourable.

3. The English language test i.e. IELTS provided by me is true to the best of my knowledge.

4. I have proof of the certificate with my photo on it.

5. All other details on the certificate are also mind.

6. I was not given time for the preparation when I requested.

23 23 In my view, no error on the part of the Federal Circuit Court has been exposed by those grounds of appeal. Ground 1 is simply assertive and offers no explanation for why error was made. Ground 2 cannot constitute a proper ground of appeal but simply describes the outcome of the decision. Ground 3 is assertive on a matter of fact which has been decided adversely to the appellant. It does not provide any basis for determining that the decision of the Tribunal was erroneous in fact, or that it was made by some jurisdictional error on its part. Ground 4 is unexplained. There is no additional material presented in support of the appeal, nor any explanation for why that additional material (if it exists) was not presented to the Tribunal in the first place. On this appeal, therefore, such material could not be received even if it were materially different from that which was considered by the Tribunal. Ground 5 is of the same general character, but in any event cannot and would not affect the result of the Tribunal's decision. Ground 6 separately raises a matter of procedural fairness, but there is no factual foundation for it and no basis for considering that the Tribunal had not complied with s 357A of the Act.

24 24 In my view, on the material in the appeal book, there is simply no basis upon which the appellant can show that the Federal Circuit Court erred in any way in its consideration of the application before it. His Honour identified the correct legislative provisions and applied them correctly to the material before him. He correctly identified the tests to be applied when considering whether jurisdictional error was established. He correctly concluded that the Tribunal's findings that PIC 4020 was not satisfied were clearly available to it, and indeed on the material before the Tribunal, were clearly supported by that material. There is nothing to suggest that the appellant was in any way denied procedural fairness as prescribed by s 357A, or that the Tribunal did not properly proceed in accordance with the applicable legislative provisions.

25 25 For those reasons, I consider that the appeal should be dismissed with costs and I so ordered on 28 November 2013.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield.

Associate:

Dated: 6 December 2013